IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

v.

Purdue Pharma, L.P., et al.,

Defendants.

Case No. CJ-2017-816
Judge Thad Balkman

MOTION FOR LEAVE TO INTERVENE, APPLICATION TO UNSEAL JUDICIAL RECORDS, AND SUPPORTING BRIEF

Non–party CBS News, a division of CBS Broadcasting Inc., which produces the news and public affairs newsmagazine "60 MINUTES" ("CBS News"), respectfully moves this Court for leave to intervene in this action for the limited purpose of seeking an order to unseal portions of the judicial record in this case and for access to that record. Specifically, CBS News seeks access to certain documents related to the defendants TEVA Pharmaceuticals USA, Inc. ("TEVA") and Cephalon Inc. ("Cephalon") that have been filed in this case under seal. In support of this motion, CBS News states as follows:

1. CBS News provides news and information for the CBS Television Network and other CBS properties. Among its many programs disseminated to viewers throughout the United States over the air and online is the nation's #1 news program, "60 MINUTES." "60 MINUTES" is approaching its 52nd season in September and still averages nearly 11 million viewers. It provides in–depth investigative reports and has won every major broadcast award.

2. In recent years, through "60 MINUTES," CBS News has extensively covered the issue of opioids and the national crisis arising from the addiction and death caused by over–

prescription and use of those drugs.[1] CBS News has also covered the issue through its regular national news programs, talk shows, and other special programming.

3. The opioid crisis has recently spawned hundreds of lawsuits across the country against opioid manufacturers, distributors, and others. This case represents one of the first of those cases actually to go to trial, and as such, it has generated national attention. Recognizing that fact, this Court authorized Courtroom View Network to provide video transmission of its proceedings online and to credentialed media. *See* Order, filed August 22, 2018 (authorizing television video coverage of trial); Supplemental Administrative Order, filed May 22, 2019 (detailing procedures and conditions).

4. During the course of these proceedings, numerous documents have been filed by the parties under seal pursuant to the Amended Protective Order entered by the Court on April 16, 2018. That Order permitted the parties to designate documents as confidential and file them under seal. The Order specifically provided, however, that "[n]othing herein shall be construed or presented as a judicial determination that any Discovery Material designated [by a party as confidential] is entitled to protection under 12 O.S. § 3226(C) or otherwise until such time as the Court may rule on a specific document or issue."

5. Both the State of Oklahoma and the defendants TEVA and Cephalon have filed numerous pleadings and documents under seal in connection with submissions to the Court as reflected in the public docket for this case on the Oklahoma State Courts Network ("OSCN"). Sometimes a redacted version of the pleading was filed concurrently, but much of the record

[1] Some of the "60 MINUTES" reports regarding the opioid crisis can be found through this link: https://link.zixcentral.com/u/5ee0b0cb/1tHB4r_o6RGzTc8jh3soMg?u=https%3A%2F%2F60min.cimediacloud.com%2Fmediaboxes%2F79a3c586add9404fb2e0dbb456bbaad6. A summary of CBS NEWS work on the subject is available through this link: https://link.zixcentral.com/u/2183e76b/MB3C4r_o6RGzTc8jh3soMg?u=https%3A%2F%2Fwww.CBSNews.com%2Fnews%2Fthe-opioid-epidemic-who-is-to-blame-60-minutes%2F. CBS News' reporting on the opioid crisis has garnered Peabody and Emmy awards for Outstanding Investigative Reporting and the coveted Edward R. Murrow Award.

submitted by the State and these defendants remains under seal. Although the parties have designated documents as confidential, there appears to be no judicial determination that the records—which but for the parties' designation would be public records—need to remain sealed.

6. CBS News seeks to intervene in this case to obtain access to some of those sealed documents for which protection is no longer—or has never been—valid or necessary in order to further the public's understanding of the pivotal role played by the defendant manufacturers in the explosion of the opioid epidemic. As explained in the brief below, the burden is on the parties seeking to retain the extensive sealing in this case to justify the continuation of that sealing. Although that burden applies to each and every document now under seal, CBS News is particularly interested in documents pertaining to Cephalon and Teva's marketing, sales and promotions of opioids, including but not limited to the following motions, exhibits, and all responses and replies thereto:

- Cephalon Motion for Partial Summary, filed February 26, 2019.
- TEVA Motion for Partial Summary Judgment filed March 15, 2019.
- TEVA/Cephalon Motion for Summary Judgment, sealed version filed April 23, 2019, redacted version filed May 2, 2019.
- TEVA/Cephalon Motion for Summary Judgment Exhibit Nos. 19–20, 37–40, 42–46, 49, 52–59, 61–62, and 76, filed under seal on May 2, 2019.
- TEVA/Cephalon Reply to Motion for Summary Judgment, filed May 9, 2019.
- Transcripts of any hearings or arguments on the foregoing summary judgment motions.
- Ex. 70 [TEVA_OK 00107392–TEVA_OK 00107461] identified as "70–page Actiq 2003 Marketing Plan" in Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Watson Laboratories, Inc., Actavis LLC, And Actavis Pharma, Inc. F/K/A Watson Pharma, Inc.'s Company Records Stipulation No. 1, filed on June 25, 2019, to the extent that it has been filed in this court ("Stipulation No. 1").[2]

[2] Numbered paragraph 72 of Stipulation No. 1 unilaterally declares Ex. 70 to be a sealed document, even if filed or entered into evidence in court.

7. The State of Oklahoma settled with TEVA for $85 million. *See* Consent Judgment as to the TEVA Defendants, filed on June 24, 2019. The settlement agreement between the State and TEVA is publicly accessible as Exhibit 1 to the Consent Judgment. Several of the material terms contained in the settlement agreement were incorporated into the Consent Judgment. However, the settlement agreement's provisions regarding confidentiality, particularly paragraph 12 of "Miscellaneous Provisions" ("Confidentiality of Documents Produced in this Action"), were not made a part of the Consent Judgment.

8. The evidentiary phase of the bench trial, which proceeded against Johnson and Johnson and Janssen Pharmaceuticals, has concluded. The Court has taken the matter under advisement and has directed the parties to submit proposed findings of fact and conclusions of law by July 31, 2019. *See* Summary Order, filed July 16, 2019.

9. The documents submitted from time to time by the State and the defendants regarding TEVA and Cephalon should now be unsealed, except to the extent that the parties can demonstrate to the Court's satisfaction that maintaining the secrecy of any portion of the record is permissible under the appropriate statutory or constitutional analysis.

SUPPORTING BRIEF

A. CBS News has standing to seek access to the records.

The right of journalists and news organizations to be heard on the limited question of obtaining access to court records and proceedings is well–established. "The press has standing to intervene in actions to which it is otherwise not a party in order to petition for access to court proceedings and records." *In re Petition of Tribune Co.*, 784 F.2d 1518, 1521 (11th Cir. 1986). The Tenth Circuit has recognized that the press has the right to challenge denials of access in both civil and criminal proceedings, even without the benefit of formal intervention. *U.S. v. McVeigh*, 119 F.3d 806, 808 (10th Cir. 1997) ("*McVeigh I*")(news media had right to be heard on motions

to unseal documents); *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1235 (10th Cir. 1986) (newspaper had standing to challenge trial court's denial of informal request for interviews of jurors following civil rights trial, because "order impeded its ability to gather news"); *see also U.S. v. McVeigh*, 918 F. Supp. 1452, 1456 (W.D. Okla. 1996) ("*McVeigh II*") (district court accepting non–party media motions to unseal court records).

Federal courts also routinely permit news organizations to intervene under Fed. R. Civ. P. 24(b)[3] for the purpose of challenging denial of access to court records or proceedings. The press "may well have an absolute right" to intervene under Rule 24(a) for purposes of obtaining such access. *Schiller v. City of N.Y.*, No. 04 Civ. 7921(KMK)(JC), 2006 WL 2788256, at *2 (S.D.N.Y. Sep. 27, 2006). Moreover, "every circuit court that has considered the question," including the Tenth Circuit, "has come to the conclusion that nonparties may permissively intervene [under Rule 24(b)] for the purpose of challenging confidentiality orders." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998), *citing United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir.1990) ("The courts have widely recognized that the correct procedure for a nonparty to challenge a protective order is through intervention" under Fed. R. Civ. P. 24(b)); *see also Johnson v. City of Tulsa*, 94–CV–39–H(M), 2003 WL 24015150, at *2 (N.D. Okla. May 15, 2003) (newspaper permitted to intervene to challenge protective order limiting access to court records); *In re Nat'l Prescription Opiate Litigation*, 927 F.3d 919 (6th Cir. 2019) (granting intervenor media appeal of denial of access to sealed records, and vacating district court protective order).

Oklahoma courts, and virtually every other state court nationwide, have implicitly recognized the standing of the media to challenge closure of proceedings or denial of access to

[3] Section 2024 of the Oklahoma Pleading Code, Okla. Stat. tit. 12, §2024, regarding intervention, is substantively identical.

records in both civil and criminal proceedings without detailed analysis of the procedure involved. The media have sometimes been permitted to intervene as in *World Publishing Co. v. White*, 2001 OK 48, 32 P.3d 835 (intervention permitted to seek disclosure of juvenile records); but, as a practical matter, in most cases the media pressing for access have relied for their standing argument on federal cases such as the *McVeigh* and *Mechem* cases cited above. In numerous unreported cases, primarily at the district court level, the courts have shown little concern for procedural niceties and have allowed the media seeking disclosure of public records to raise the access issue by motion. *See, e.g., Shadid v. Hammond*, 2013 OK 103, 315 P.3d 1008 (authorizing newspaper publisher to file motion for access to judicial records and directing district court to conduct hearing on access). Thus, CBS News has standing to raise the issue of unsealing documents before this Court.

B. The records CBS News seeks are presumptively subject to disclosure.

Documents filed in this case, whether sealed or unsealed, are public records. *Oklahoma Association of Broadcasters v. City of Norman*, 2016 OK 119, 390 P.3d 689 (video of defendant's arrest a public record in part because court directed it to be filed in the case); *Shadid v. Hammond, supra* ("documents filed with the Court Clerk's office are public records and available for public access") (J. Taylor, concurring); *Nichols v. Jackson*, 2001 OK CR 35, 38 P.3d 228 (documents filed with Oklahoma Supreme Court subject to Oklahoma Open Records Act); Okla. Stat. tit. 51, §24A.3(2) ("public body" subject to Open Records Act includes "court"); 1999 OK AG 58 (office of court clerk a "public body" subject to Open Records Act and documents filed with clerk are public records). As such, they are presumptively open to public inspection. Indeed, the Oklahoma Open Records Act specifically states in its definitional section on public policy:

> Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access.

Okla. Stat. tit. 12, §24A.2.[4]

This presumptive right of access has its foundation in constitutional principles. The Supreme Court recognizes that the First Amendment carries with it an implicit right of public access to certain government proceedings and records. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 10–13 (1986). The right is also secured at common law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

The presumptive right of access extends to civil litigation, *see, e.g., Westmoreland v. CBS NEWS, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) ("the First Amendment does secure to the public and to the press a right of access to civil proceedings"), and to documents filed in civil proceedings. *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) ("without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not be in a position to serve as an effective check on the system."). Civil case files are presumptively open because the "public has a fundamental interest in understanding the disputes presented to and decided by the courts, so as to assure that they are run fairly and that judges act honestly." *Huddleson v. City of Pueblo, Colo.*, 270 F.R.D. 635, 636 (D. Colo. 2010) (declining to seal records filed in civil action alleging discrimination and retaliation in police employment), *citing Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980); *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012) (recognizing right of access to records filed in civil appeal). The presumptive right of access has specifically been held to apply to summary judgment

[4] In *Shadid v. Hammond, supra,* former Chief Justice Steven Taylor wrote in a concurring opinion that "[t]here are no provisions in the Oklahoma Open Records Act that allow parties to simply agree to seal a public record and submit a summary agreed order to the court. Sealing a public record should be a very rare event that occurs in only the most compelling of circumstances."

motions and attached documents. *See, e.g., Brown v. Maxwell*, No. 18–2868, 2019 WL 2814839 (2d Cir. Jul. 3, 2019); *Company Doe v. Public Citizen*, 749 F.3d 246 (4th Cir. 2014); *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567 (4th Cir. 2004); *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096 (9th Cir. 1999); *Republic of Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653 (3d Cir. 1991); *Stone v. Univ. of Md. Med. Sys. Corp.*, 948 F.2d 128 (4th Cir. 1988); *Rushford v. New Yorker Magazine*, 846 F.2d 249 (4th Cir. 1988); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982).

The constitutional and common law right to access court records and proceedings serves fundamental purposes of ensuring that the judiciary has a "measure of accountability" and the public has "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). In *In re Nat'l Prescription Opiate Litigation*, 927 F.3d 919, 939 (6th Cir. 2019), the court recognized that the "strong presumption of openness" once records are filed in court is "justified because '[t]he public has an interest in ascertaining what evidence and records the District Court and this Court have relied on in reaching our decisions.'" (*quoting Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1181 (6th Cir. 1983)). This right of access is of such paramount importance that it can be preempted only by competing interests which are themselves more compelling:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is ***essential to preserve higher values*** and is ***narrowly tailored*** to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press–Enterprise Co., 478 U.S. at 9-10 (emphasis added); *accord, McVeigh I*, 119 F.3d at 811; *McVeigh II*, 918 F. Supp. at 1463; *Nichols v. Jackson*, 2001 OK CR 35, ¶3, 38 P.3d 228. Stated otherwise, court records cannot be sealed unless the denial of access is "necessitated by a compelling government interest and narrowly tailored to serve that interest." *Virginia Dep't of*

State Police v. Washington Post, 386 F.3d 567, 573 (4th Cir. 2004).[5]

This rule of law is placed in sharp relief in proceedings such as this one, involving the massive distribution and abuse of prescription opioids, or, as one court has described it, "a plague on [our] citizens and their local and State governments." *In re Nat'l Prescription Opiate Litigation*, 927 F.3d 919, 924 (6th Cir. 2019). *See also* S. Rich, M. Sánchez Diez & K. Vongkiatkajorn, "How to download and use the DEA pain pills database," *Washington Post*, July 18, 2019, accessible at https://www.washingtonpost.com/national/2019/07/18/how-download-use-dea-pain-pills-database/?utm_term=.abf7c3a91160 (making publicly available the extensive DEA database that was ordered released after the decision in *In re Nat'l Prescription Opiate Litigation*.

C. Unless defendants can demonstrate a compelling need to retain the seals, the records CBS News seeks should be unsealed.

In *United States v. Pickard*, 733 F.3d 1297, 1300 (10th Cir. 2013), the Tenth Circuit set out the following standards a federal court must apply when presented with a motion to unseal: [6]

1. Consistent with the presumption that judicial records should be publicly available, "the party seeking to keep records sealed bears the burden of justifying that secrecy, even where, as here, the district court already previously determined that those documents should be sealed." *Pickard* at 1302. The proponent's burden is significant; it must demonstrate a substantial probability of prejudice to a compelling interest. *See, e.g., Richmond Newspapers*, 448 U.S. at 580–81; *Press–Enter.*, 478 U.S. at 13–14.

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[5] These judicial concepts are often recognized in local federal civil rules. For example, LCvR 79.1(a) in the U.S. District Court for both the Eastern and Northern Districts of Oklahoma provides:

> It is the policy of this Court that sealed documents, confidentiality agreements, and protective orders are disfavored. Sealed documents and confidentiality agreements may be approved by the Court only upon a showing that a legally protected interest of a party, non–party or witness outweighs the compelling public interest in disclosure of records.

[6] While there is sparse authority from Oklahoma appellate courts regarding access to public documents, the *Pickard* standards are wholly consistent with the Oklahoma Open Records Act and what authority does exist in this State.

2. The proponent must "articulate a sufficiently significant interest that will justify continuing to override the presumption of public access[.]" *Pickard*, 733 at 1303.

3. Any continued sealing must be narrowly tailored. A case file should not be sealed completely where limited sealing or redaction of individual records would suffice to protect the asserted interest in secrecy. *Id.* at 1304. The party seeking to restrict access must demonstrate there is no alternative to adequately protect the threatened interest. *Press-Enter. II*, 478 U.S. at 13–14.

4. Any continued restriction imposed on access must be effective in protecting the threatened interest for which sealing is imposed. *Id.* at 14.

Thus, there must be a clearly–identified present and compelling need for the seal on all aspects of any given document. Although CBS News cannot describe in detail the documents that are under seal precisely because they cannot be seen, it is clear that at this point these seals must, at least in large part, be lifted. The passage of time weakens any asserted need to seal based on competitive interests, while, on the other hand, the public interest in these documents and their reflection of the roles played by these defendants in the explosion of the deadly opioid epidemic has only grown more powerful.

Moreover, the only justification in this record for filing the documents under seal in the first place was that the defendants had designated them as "confidential" or "attorneys eyes only" under a discovery protective order. But parties cannot "simply agree to seal a public record and submit a summary agreed order to the court," *Shadid v. Hammond*, 2013 OK 103, 315 P.3d 1008 (J. Taylor, concurring); and "parties cannot overcome the presumption against sealing judicial records simply by pointing out that the records are subject to a protective order[.]" *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011). "Rather, the parties must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making

process." *Id.* Insofar as is evident from the OSCN docket, this Court has not judicially determined that the documents meet the protective order's criteria for a confidential (or higher) designation. For example, it does not appear this Court has specifically found that the sealed documents identified above are subject to any statutory privilege or constitute statutorily–protected trade secrets or proprietary commercial information whose disclosure would now significantly impair the defendants' commercial interests so as to permit continued sealing. And, even to the extent that any sealed document contained a once strategic plan, the passing of years, if not decades, means that any interest in sealing can no longer be compelling, or even substantial. See *In re Nat'l Prescription Opiate Litigation*, 927 F.3d 919, 937 (6th Cir. 2019) ("the age of the data makes the risk of anticompetitive harm slight and speculative").

Again, the burden on identifying a "significant interest" in continued secrecy, sufficient to outweigh the public's interest in disclosure, rests with the party advocating for continued sealing. *Pickard* at 1302. Even if there was some basis for sealing the documents initially during discovery, at this post–trial point no justification appears to exist for ongoing sealing. Continued secrecy plainly is not necessary to protect any right to a fair trial. There are no identified privacy interests at stake with respect to TEVA and Cepahlon, which are commercial businesses, and the Oklahoma Open Record Acts expressly states that any privacy interests are adequately protected by the exemptions in the Act. And courts have generally rejected claims by corporations that have been accused of wrongdoing that disclosure of information about them would be embarrassing. *See, e.g., Romero v. Drummond Co.*, 480 F.3d 1234 (11th Cir. 2007); *Republic of Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653 (3d Cir. 1991); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165 (6th Cir. 1983). In short, no interest—compelling or otherwise—justifies continued sealing of the documents CBS News is seeking.

It is, in conclusion, worth noting that the public has perhaps the strongest interest in the health and safety of its citizens and that those interests are starkly implicated here, in litigation by a public entity against the purveyors of the drugs that have given rise to the "plague" of opioid addiction. *See In re Nat'l Prescription Opiate Litigation*, 927 F.3d 919, 924 (6th Cir. 2019) (concluding that district court abused its discretion "by denying Intervenors the opportunity to expose the [DEA ARCOS] data [regarding distribution of controlled substances] to the broad daylight of public reporting").

Accordingly, CBS News respectfully requests that this Court unseal the documents discussed herein.

Respectfully submitted,

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I hereby certify that on July 19, 2019, the foregoing instrument was transmitted electronically and mailed, postage prepaid, to the following counsel of record:

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